Tulsa Law Review

Volume 24 | Issue 2

Winter 1988

The Insured's Right to Choose Defense Counsel

Michaelle Kissell Price

THE INSURED'S RIGHT TO CHOOSE DEFENSE COUNSEL

I. INTRODUCTION

Virtually every adult American purchases some type of liability insurance and thus becomes an "insured." Common types of insurance contracts include automobile liability coverage, homeowner's liability coverage, and liability coverage for a business establishment. Liability insurance policies generally contain two provisions of importance to the insured. First, the insurance contract promises payment of judgments rendered against the insured as a result of occurrences covered by the policy. While the scope of coverage varies, insurance policies usually do not cover occurrences resulting from intentional conduct. In addition to liability coverage, most insurance policies include a defense clause wherein the insurance company agrees to defend the insured against liability claims.

In most cases, the insurance company and its insured have a common interest in defeating the lawsuit. There are, however, numerous scenarios where the interests of the insured and the insurer may conflict. Because the typical defense clause in an insurance contract affords the insurance company complete control over the insured's defense, the insured may be forced to accept defense by an attorney retained by a potential adversary.

Although Oklahoma courts have not yet addressed this issue, a number of courts have required insurance companies to pay for an independent attorney selected by the insured if a conflict of interest arises.[1] However, this trend has been criticized for its harsh economic impact on insurance companies. Some jurisdictions have mitigated this impact by adopting a moderate position which is beneficial to the interests of both parties. Both Oklahoma courts and the state legislature should consider adopting a similar moderate position requiring insurance companies to provide an impartial defense by independent counsel if a conflict of interest exists between the insurance company and its insured.

1. *See infra* notes 50-52 and accompanying text.

II. THE CONFLICT OF INTEREST SCENARIO

A typical liability insurance policy contains a clause which provides that the insurance company will defend the insured against lawsuits which allege occurrences covered by the policy.[2] The defense clause within the insurance policy generally provides both a duty to defend the insured and a right to assume control of the defense.[3] Although insureds may regard such a defense clause as inserted for their own benefit, the primary purpose of such clauses is to protect the insurance company by allowing it to control the litigation or settlement of the case.[4]

When a third party brings suit against an insured, the insurer's duty to defend is usually determined by the allegations in the claim. If the suit alleges conduct or an occurrence which the policy covers, then the insurer is contractually bound to undertake the defense.[5] Suits alleging both covered and non-covered occurrences generally trigger the insurer's duty to defend.[6] However, the duty to defend may not be readily apparent from the face of the allegations. A few courts have held that the insurance company must defend its insured where any possibility exists that a trial court could find the insured liable for an occurrence that the policy covers—even though the third party's suit specified only a non-covered occurrence.[7]

Once an insured makes a claim, an insurer who doubts whether the

2. M. Berch & R. Berch, *Will the Real Counsel for the Insured Please Rise?*, 19 ARIZ. ST. L.J. 27, 29 (1987); Comment, *Reexamining Conflicts of Interest: When is Private Counsel Necessary?*, 17 PAC. L.J. 1421, 1423 (1986). *See also* Dugas Pest Control v. Mutual Fire, Marine & Inland Ins. Co., 504 So. 2d 1051, 1053 (La. Ct. App. 1987); Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 388, 267 A.2d 7, 9 (1970).

3. Norman v. Insurance Co. of N. Am., 218 Va. 718, 720, 239 S.E.2d 902, 903 (1978). The court quoted the relevant provision as follows: " 'the company shall have the right and duty to defend any suit against the insured seeking damages . . .' " *Id.*; Comment, *Reservation of Rights Notices and Nonwaiver Agreements*, 12 PAC. L.J. 763, 763 (1981).

4. *See* Nandorf, Inc. v. CNA Ins. Cos., 134 Ill. App. 3d 134, 136, 479 N.E.2d 988, 991 (1985); *Burd*, 56 N.J. at 388-89, 267 A.2d at 10; 7C J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4681 (1979); Bianchesi, *Coverage Disputes with the Insured: The Insurer's Perspective*, 48 INS. COUNS. J. 153, 153 (1981); Note, *Use of the Declaratory Judgment to Determine a Liability Insurer's Duty to Defend - Conflict of Interests*, 41 IND. L.J. 87, 88 (1965).

5. United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 937 (8th Cir. 1978); Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 193, 355 N.E.2d 24, 28 (1976).

6. Rhodes v. Chicago Ins. Co., 719 F.2d 116, 119 (5th Cir. 1983); *Maryland Casualty*, 64 Ill. 2d at 194, 355 N.E.2d at 28 (1976); Ferguson v. Birmingham Fire Ins. Co., 254 Or. 496, 506, 460 P.2d 342, 347 (1969).

7. *Ferguson*, 254 Or. at 507, 460 P.2d at 347. "For example, in an action of trespass brought against the insured, if the complaint alleges a willful entry (in order to support a claim for punitive damages), the plaintiff could, without amending the complaint, recover ordinary damages for a non-willful entry. The insurer, therefore, would have the duty to defend. The innocent trespass may be treated as a 'lesser included offense' by analogy to the criminal law." *Id. See also* Patrons Mut. Ins. Ass'n. v. Harmon, 240 Kan. 707, 710, 732 P.2d 741, 744 (1987).

claim is covered by the policy faces a number of choices. Frequently, the insurer will agree to defend the insured while explicitly reserving the right to contest coverage later.[8] The insurance company may accomplish this unilaterally by notifying the insured that the insurer reserves its rights to contest coverage, or bilaterally through a nonwaiver agreement signed by the insured.[9] Alternatively, the insurance company may seek a declaratory judgment to determine whether it must defend the insured.[10] Finally, the insurer may refuse to either defend or seek declaratory judgment;[11] however, this choice involves the risk that a court may later find this action to be unjustified.[12] Of course, the insurer may simply choose to defend without a reservation of rights or nonwaiver agreement,[13] although it will be estopped from claiming non-coverage later should the insured be found liable.[14]

Any dispute over coverage and the insurer's duty to defend may portend a conflict of interest between the insurer and its insured. Such a conflict commonly arises when the third party's suit contains allegations based on negligence, which generally would be covered under most liability policies, and allegations of intentional behavior, which generally would not be covered by the policy.[15] Another conflict of interest scenario arises when an insurer denies coverage based on issues not pertinent to the underlying suit, such as lapse of coverage.[16] Additionally, where the underlying suit claims both compensatory and punitive damages, a court may find a conflict of interest.[17] A conflict may also exist where

8. Saxon, *Conflicts of Interest: Insurers' Expanding Duty to Defend and the Impact of 'Cumis' Counsel*, 23 IDAHO L. REV. 351, 352 (1986-87).

9. Motorists Mut. Ins. v. Trainor, 33 Ohio St. 2d 41, 45, 294 N.E.2d 874, 877 (1973).

10. Pekin Ins. Co. v. Home Ins. Co., 134 Ill. App. 3d 31, 34-35, 479 N.E.2d 1078, 1081 (1985); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 405, 347 A.2d 842, 848 (1975); Note, *Declaratory Judgment*, *supra* note 4, 95-96. *See also* Metropolitan Property & Liab. Ins. Co. v. Kirkwood, 729 F.2d 61 (1st Cir. 1984).

11. Poust, *Insurers' Tender to Insureds of Right to Choose Counsel at Insurers' Expense: When Need This Be Done?*, 51 INS. COUNS. J. 563, 564 (1984); Note, *supra* note 4, at 94-95.

12. Comment, *Reexamining Conflicts of Interest: When is Private Counsel Necessary?*, 17 PAC. L.J. 1421, 1425-26 (1986). *See, e.g.*, Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966); Note, *supra* note 4, at 94-95.

13. Note, *supra* note 4, at 92-93.

14. Clemmons v. Travelers Ins. Co., 88 Ill. 2d 469, 475, 430 N.E.2d 1104, 1107 (1981); Murphy v. Urso, 88 Ill. 444, 451, 430 N.E.2d 1079, 1082 (1981).

15. *See* Dondanville, *Defense Counsel Beware: The Perils of Conflicts of Interest*, 26 TRIAL LAW. GUIDE 408 (1983).

16. *See* Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 289 (Alaska 1980) (insurer disclaimed liability on grounds that insured breached cooperation clause).

17. *See* Public Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 425 N.E.2d 810 (1981). *But see* Pennbank v. St. Paul Fire & Marine Ins. Co., 669 F. Supp. 122, 127 (W.D. Pa. 1987) (Because compensatory damages, which are covered by insurance policies, are a prerequisite to an award of

the insured's interests preclude settlement but the policy allows the insurer to settle without consent.[18] Less commonly, courts have found that a conflict exists when the insurer must defend two separate clients having divergent interests.[19]

Courts have offered various explanations of the nature of the potential detriment to insureds. Some courts have expressed concerns that the insurer's attorney might not provide a vigorous defense of the insured.[20] Other courts frankly recognize that an attorney hired by an insurer to represent an insured may have dual allegiances.[21] The attorney is ethically bound to represent the insured, yet the insurer pays the costs of defense and is the source of future business.[22] While the conflict of interest is often subtle, blatant conflicts do occur, as where the same attorney represents the insured in a tort action and subsequently represents the insurance company in an action against the insured to deny coverage.[23]

III. THE GENESIS OF THE INDEPENDENT COUNSEL TREND

In litigation involving insurance defense, the traditional rule was that unless the insurer refused to defend or defended in bad faith, no conflict of interest existed, and the insured had no right to control the defense.[24] Some courts have refused to consider the possible detriment to insureds, reasoning that professional responsibility guidelines provide that the insured is the attorney's only client, precluding any compromise

punitive damages, which are not covered, both insurer and insured share the common goal of avoiding liability; thus, there is no conflict of interests.); Nandorf, Inc. v. CNA Ins. Cos., 134 Ill. App. 3d 134, 140, 479 N.E.2d 988, 993 (1985) (Although the court found a conflict of interest based on the likelihood of a punitive damages award, the court stated "[o]ur finding that a conflict of interest existed in the instant case is not meant to imply that an insured is entitled to independent counsel whenever punitive damages are sought in the underlying action.").

18. Bianchesi, *Coverage Disputes with the Insured; The Insurer's Perspective*, 48 INS. COUNS. J. 153, 155 (1981) (citing Rogers v. Robson, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979)).

19. *See* Murphy v. Urso, 88 Ill. 2d 444, 453-54, 430 N.E.2d 1079, 1083-84 (1981) (The interests of both insureds required a finding that the other was liable, yet the same insurer faced the dilemma of controlling both defense strategies.).

20. *Continental*, 608 P.2d at 289.

21. Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co., 832 F.2d 1037, 1045 (7th Cir. 1987); San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 364, 208 Cal. Rptr. 494, 498 (1984).

22. United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978). "Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client — the one who is paying his fee and from whom he hopes to receive future business — the insurance company." *Id. See also* Saxon, *Conflicts of Interest: The Insurer's Expanding Duty to Defend and the Impact of 'Cumis' Counsel*, 23 IDAHO L. REV. 351 (1986-87).

23. *See, e.g.*, Industrial Indem. Co. v. Great Am. Ins. Co., 73 Cal. App. 3d 529, 140 Cal. Rptr. 806 (1977).

24. Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621, 626 (10th Cir. 1942).

of the insured's interests.[25] If the insurer refused to defend because of a tangible conflict, the insured's only choice was to engage an independent attorney at the insured's own expense.[26]

Although the language of the New York Court of Appeals in *Prashker v. United States Guarantee Co.*[27] has been regarded as the genesis of the independent counsel trend, a much earlier case, *Boise Motor Car Co. v. St. Paul Mercury Indemnity Co.*,[28] approved reimbursement of an insured's attorney fees where the insurer's conduct endangered the insured's best interests.[29] In *Boise*, the insured refused to accept the insurer's defense under full reservation of rights and retained his own attorney, yet the insurer refused to withdraw its defense of the suit.[30] The Idaho Supreme Court found that such behavior constituted a waiver by the insurer of its right to withdraw and that the insurer must pay the cost of the attorney retained by the insured for protection against the insurer.[31] However, the opinion contains no general language supporting the right of an insured to retain separate counsel when confronted with other conflict of interest situations.

In contrast to the narrow *Boise* holding, the language in *Prashker v. United States Guarantee Co.* broadly supports the right of an insured to protection from conflicts of interest.[32] In *Prashker*, the administratrix of the deceased's estate sought declaratory judgment that the insurance policy covered the fatal accident, and thus the insurer was obligated to defend against the underlying tort suit.[33] The suit contained both covered and non-covered allegations; however, the insurer declined coverage based on a violation of a policy provision rather than a coverage issue.[34] Because the violation or non-violation of the particular policy provision

25. Norman v. Insurance Co. of N. Am., 218 Va. 718, 727, 239 S.E.2d 902, 907 (1978). "A client may presume that his attorney has no interest which will interfere with his devotion to the cause confided in him." *Id.*

26. Harbin v. Assurance Co. of Am., 308 F.2d 748, 750 (10th Cir. 1962). "[T]he court should not force the insurer into the conflict of interests position which will result if defense of [the underlying tort suit] is required." *Id.*

27. 1 N.Y.2d 584, 136 N.E.2d 871 (1956).

28. 62 Idaho 438, 112 P.2d 1011 (1941).

29. *Id.* at 449, 112 P.2d at 1016.

30. *Id.*.

31. *Id.*

32. Prashker v. United States Guarantee Co., 1 N.Y.2d 584, 593, 136 N.E.2d 871, 876 (1956).

33. *Id.* at 587, 136 N.E.2d at 872.

34. *Id.* at 590, 136 N.E.2d at 874.

would be developed at trial to determine whether the deceased was willfully reckless or merely negligent, the court found that declaratory judgment was inappropriate.[35] Further, in response to the insurer's plea that its duty to defend should be discharged because its attorney would face a conflict of interest, the court stated that should such a conflict arise, insureds have the right to choose their own counsel at the insurer's expense.[36]

Like *Prashker*, a number of jurisdictions have found the appointment of independent counsel proper, as opposed to the traditional action for declaratory judgment.[37] The propriety of a declaratory judgment on the issue of coverage and duty to defend is generally contingent on whether coverage is contested on grounds that will be litigated in the underlying suit.[38] For example, because the issue of intent is generally a key element in the underlying tort suit, a declaratory judgment on that issue would be inappropriate. However, declaratory judgment would be appropriate if the insurer seeks to prove that the insured's policy has lapsed, an issue not relevant to the underlying tort suit.[39] Additionally, at least one court has found that the doctrine of collateral estoppel, which precludes relitigation of issues already adjudicated, prevents use of the declaratory judgment.[40] Further, to decide whether the insured's conduct was negligent or intentional in a declaratory judgment action violates the injured third party's right to control litigation of the tort claim.[41]

---

35. *Id.* at 591, 136 N.E.2d at 875. "It would be premature to attempt to decide in a declaratory judgment action without a jury, what the [third party plaintiff] is going to prove later at the trial or trials of the negligence actions." *Id.*

36. *Id.* at 593, 136 N.E.2d at 876.

37. *See, e.g.*, Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 630-31, 240 A.2d 397, 402 (1968).

38. Continental Ins. Co. v. Bayless & Roberts, Inc. 608 P.2d 281, 288-289 (Alaska 1980); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 405, 347 A.2d 842, 848-49 (1975); Employers' Fire Ins. Co. v. Beals, 130 R.I. 623, 631, 240 A.2d 397, 401-02 (1968). *See also* Note, *supra* note 4, at 92.

39. *See, e.g., Brohawn*, 276 Md. at 405, 347 A.2d at 848-49. The court stated:

> If the issue upon which coverage is denied were not the ultimate issue to be determined in a pending suit by a third party, a declaratory judgment would be appropriate. But where, as here, the question to be resolved in the declaratory judgment action will be decided in pending actions, it is inappropriate to grant a declaratory judgment.

Id. at 406, 347 A.2d at 849.

40. Murphy v. Urso, 88 Ill. 2d 444, 455, 430 N.E.2d 1079, 1084 (1982). *But see* Note, *supra* note 4, at 92.

41. *Murphy*, 88 Ill. App. 2d at 456, 430 N.E.2d at 1085. According to the court, a declaratory judgment would prejudice the third party plaintiff by precluding her "opportunity to control the venue and timing of the suit, an important consideration where court calendars are clogged." *Id.* at 456, 430 N.E.2d at 1085; *Beals,* 103 R.I. at 630, 240 A.2d at 402. "We are of the belief that to allow insurance companies to litigate issues which are identical with ones to be tried later during the injury suit would be tantamount to permitting insurance companies to assume unfairly the control and command of the tort litigation." *Id.*

Although the *Prashker* court's discussion of independent counsel was merely dicta, other jurisdictions have embraced the concept. In *Magoun v. Liberty Mutual Insurance Co.*,[42] the Supreme Judicial Court of Massachusetts found that ambiguities in the insurance contract should be resolved in favor of the insured. Accordingly, the insurer should pay the costs of the insured's independent counsel after the insured refused to accept defense by the insurer under reservation of rights.[43] Although the *Magoun* court's holding was narrowly restricted to the facts of the case, the United States Court of Appeals for the Eighth Circuit followed *Magoun* in holding that an insurer may not shirk its duty to pay the costs of defense by claiming the existence of a conflict of interest.[44]

Soon after the *Magoun* decision, the Texas Court of Civil Appeals held that where an insurer placed itself in conflict with its insured's best interests by denying coverage, the insurer must pay for the insured's attorney fees.[45] In 1968, Rhode Island became the next jurisdiction to rule in favor of independent counsel chosen by the insured.[46] In *Employers' Fire Insurance Co. v. Beals*,[47] the Rhode Island Supreme Court supported an insured's right to refuse a defense under reservation of rights. The court discussed the *Prashker* solution requiring the insurer to pay reasonable costs of the insured's choice of counsel and examined a second option of representation by two attorneys, one for the insurer and one for the insured.[48] While condoning both of these solutions, the court added a further requirement that the insurer must approve the insured's choice of counsel.[49] The court reasoned that such ratification was necessary because the insurer must bear the cost of such counsel; moreover, the insurer has a valid interest in the choice of qualified counsel in order to decrease the risk of an adverse verdict which it must ultimately pay.[50]

42. 346 Mass. 677, 195 N.E.2d 514 (1964).
43. *Id.* at 684, 195 N.E.2d at 519.
44. Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 538 (8th Cir. 1970).
45. Steel Erection Co. v. Travelers Indem. Co., 392 S.W.2d 713, 716 (Tex. Civ. App. 1965).
46. Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 240 A.2d 397 (1968).
47. *Id.* at 633-34, 240 A.2d at 403.
48. *Id.* at 634-35, 240 A.2d at 404.
49. *Id.*
50. *Id.* While the court acknowledged the financial hardship a requirement of independent counsel imposed on the insurer, the court stated that "the necessity for this action stems from its [the insurer's] failure to provide within any degree of clarity for this contingency . . . The insurer, being the draftsman, should have set forth its provisions in such clear and distinct language as would have avoided any doubt relative to the extent of its duty to defend." *Id.*

IV. BREADTH OF OPINIONS REQUIRING INDEPENDENT COUNSEL

After *Beals*, the trend of allowing insureds to choose their counsel continued to spread. At least eleven state courts[51] and federal courts in seven circuits have recognized the necessity of separate counsel to represent insureds where conflicts exist.[52] However, courts differ in the degree of latitude given to insureds, and a number of recent decisions adopt a restrictive view of the earlier stance on the issue.[53]

Many of the decisions on the independent counsel issue resulted when an insurer claimed it had no duty to defend because of lack of policy coverage and one of the parties sought declaratory judgment on the issue.[54] Although declaratory judgment has traditionally been used to define the parties' rights and resolve conflicts, courts may now find it inappropriate, particularly where the issue determining coverage will be litigated in the third party suit.[55] Moreover, at least nine jurisdictions

51. Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281 (Alaska 1980); San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc. 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984); Murphy v. Urso, 88 Ill. 2d 444, 430 N.E.2d 1079 (1982); Patrons Mut. Ins. Ass'n. v. Harmon, 240 Kan. 707, 732 P.2d 741 (1987); Dugas Pest Control v. Mutual Fire, Marine & Inland Ins. Co., 504 So. 2d 1051 (La. Ct. App. 1987); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975); Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677, 195 N.E.2d 514 (1964); Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 267 A.2d 7 (1970); Public Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 425 N.E.2d 810 (1981); Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 240 A.2d 397 (1968); Steel Erection Co. v. Travelers Indem. Co., 392 S.W.2d 713 (Tex. Civ. App. 1965).

52. Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co., 832 F.2d 1037 (7th Cir. 1987) (relying on Illinois law); Fireman's Fund Ins. Co. v. Waste Management of Wis., Inc., 777 F.2d 366 (7th Cir. 1985) (relying on Wisconsin law); New York State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984) (under New York law); Rhodes v. Chicago Ins. Co., 719 F.2d 116 (5th Cir. 1983) (relying on Texas law); Previews, Inc. v. California Union Ins. Co., 640 F.2d 1026 (9th Cir. 1981) (under California law); United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932 (8th Cir. 1978); Babcock & Wilcox Co. v. Parsons Corp. 430 F.2d 531 (8th Cir. 1970); St. Paul Fire & Marine Ins. Co. v. Roach Bros., 639 F. Supp. 134 (E.D. Pa. 1986); Northland Ins. Co. v. Heck's Serv. Co., 620 F. Supp. 107 (E.D. Ark. 1985); American Motorists Ins. Co. v. Trane Co., 544 F. Supp. 669 (W.D. Wis. 1982), *aff'd*, 718 F.2d 842 (7th Cir. 1983); Southern Md. Agricultural Ass'n. v. Bituminous Casualty Corp., 539 F. Supp. 1295 (D. Md. 1982); All-Star Ins. Corp. v. Steel Bar, Inc., 324 F. Supp. 160 (N.D. Ind. 1971).

53. *See, e.g.*, McGee v. Superior Court, 176 Cal. App. 3d 221, 221 Cal. Rptr. 421 (1985); Saxon, *Conflicts of Interest: Insurers' Expanding Duty to Defend and the Impact of "Cumis" Counsel*, 23 IDAHO L. REV. 351, 362-63 (1986-87).

54. Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co., 832 F.2d 1037 (7th Cir. 1987); Fireman's Fund Ins. Co. v. Waste Management of Wis., Inc., 777 F.2d 366 (7th Cir. 1985); New York State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984); Northland Ins. Co. v. Heck's Serv. Co., 620 F. Supp. 107 (E.D. Ark. 1985); Southern Md. Agricultural Ass'n. v. Bituminous Casualty Corp., 539 F. Supp. 1295 (D. Md. 1982); Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976); Pekin Ins. Co. v. Home Ins. Co., 134 Ill. App. 3d 31, 479 N.E.2d 1078 (1985); Nandorf, Inc. v. CNA Ins. Cos., 134 Ill. App. 3d 134, 479 N.E.2d 988 (1985); Patrons Mut. Ins. Ass'n. v. Harmon, 240 Kan. 707, 732 P.2d 741 (1987); Public Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 425 N.E.2d 810 (1981); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975).

55. Northland Ins. Co. v. Heck's Serv. Co., 620 F. Supp. 107, 108 (E.D. Ark. 1985); Maryland

have stated that an insurer's decision to reserve its right to later contest coverage presents a conflict of interest that cannot be resolved through declaratory judgment. In such cases, the insured should receive the services of an independent attorney.[56]

Other courts have held that insurers must do more than merely reserve their rights to create a conflict of interest.[57] In Illinois, the employment of independent counsel is justifiable only where the same insurer owes a duty to defend two insureds who are adverse parties, or where facts exist which would enable the insurer to shift liability from itself to the insured.[58] The United States District Court for the Eastern District of Pennsylvania requires outward manifestation of the insurance company's intent to jeopardize the insured.[59] Other courts have stated that only where the insurer's reservation of rights is based on grounds to be established in the underlying suit does a sufficient conflict exist which

Casualty Co. v. Peppers, 64 Ill. 2d 187, 197, 355 N.E.2d 24, 30 (1976); Murphy v. Urso, 88 Ill. 2d 444, 455, 430 N.E.2d 1079, 1084 (1981); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 405, 347 A.2d 842, 848 (1975); Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 391-92, 267 A.2d 7, 11 (1970); Prashker v. United States Guarantee Co., 1 N.Y.2d 584, 591, 136 N.E.2d 871, 875 (1956); Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 630, 240 A.2d 397, 402 (1968).

56. Rhodes v. Chicago Ins. Co., 719 F.2d 116 (5th Cir. 1983) (under Texas law); Previews, Inc. v. California Union Ins. Co., 640 F.2d 1026 (9th Cir. 1981) (under California law); United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932 (8th Cir. 1978); Northland Ins. Co. v. Heck's Serv. Co., 620 F. Supp. 107 (E.D. Ark. 1985); American Motorists Ins. Co. v. Trane Co., 544 F. Supp. 669 (W.D. Wis. 1982), *aff'd*, 718 F.2d 842 (7th Cir. 1983); Southern Md. Agricultural Ass'n. v. Bituminous Casualty Corp., 539 F. Supp. 1295 (D. Md. 1982); Patrons Mut. Ins. Ass'n. v. Harmon, 240 Kan. 707, 732 P.2d 741 (1987); Brohawn v. Transamerica Ins. Co., 276 Md. 396, 347 A.2d 842 (1975); Magoun v. Liberty Mut. Ins. Co., 346 Mass. 677, 195 N.E.2d 514 (1964); Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 267 A.2d 7 (1970); Public Serv. Mut. Ins. Co. v. Goldfarb, 53 N.Y.2d 392, 425 N.E.2d 810 (1981).

57. Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co., 832 F.2d 1037, 1046 (7th Cir. 1987); St. Paul Fire & Marine Ins. Co. v. Roach Bros., 639 F. Supp. 134, 139 (E.D. Pa. 1986); McGee v. Superior Court, 176 Cal. App. 3d 221, 226, 221 Cal. Rptr. 421, 424 (1985); Clemmons v. Travelers Ins. Co., 88 Ill. 2d 469, 478, 430 N.E.2d 1104, 1109 (1981); Pekin Ins. Co. v. Home Ins. Co., 134 Ill. App. 3d 31, 35, 479 N.E.2d 1078, 1081 (1985).

58. Pekin Ins. Co. v. Home Ins. Co., 134 Ill. App. 3d 31, 35, 479 N.E.2d 1078, 1081 (1985). The insurer negotiated a settlement on behalf of its named insured up to the policy limits. The settlement, however, preserved the injured third party's right to sue the insured's employer, the White Sox, who were also insureds under the terms of the policy. Despite the fact that the insurer had previously left the Sox exposed to a lawsuit, the court found that the insurer's defense under a reservation of rights did not constitute sufficient conflict of interest to warrant an independent attorney for the White Sox. *See also* Zulkey and Pollard, *The Duty to Defend After Exhaustion of Policy Limits,* FOR THE DEF., June 1985, at 21.

59. St. Paul Fire & Marine Ins. Co. v. Roach Bros., 639 F. Supp. 134, 139 (E.D. Pa. 1986). In holding that a conflict of interest only exists where the defense actually acts in a prejudicial manner, the court stated "[w]ith respect to the existence of both covered and uncovered claims or theories of liability, the potential for conflict is much greater [than where the claim exceeds policy limits], but actual conflict is not inevitable." *Id.*

compels representation by an independent attorney.[60]

V. THE MODERATE POSITION: BALANCING THE INTERESTS OF BOTH INSURERS AND INSUREDS

Some jurisdictions attempt to return control to insurers by allowing them to influence the choice of independent counsel. The court in *Employers Fire Insurance Co. v. Beals*[61] held that the insurer should have the opportunity to approve the insured's choice of counsel because the expertise of the chosen attorney directly affects the amount the insurer may be called on to indemnify.[62] The United States Court of Appeals for the Seventh Circuit recently held that principles of fairness dictated that an insured's choice of counsel should be subject to the insurance company's approval.[63] In a later case, the Seventh Circuit approved a plan wherein the insured would select defense counsel from a list of acceptable attorneys provided by the insurer.[64]

At least two courts have found that the insured's interests may be adequately protected where the insurer chooses the independent defense attorney. The Supreme Court of Kansas has approved such a procedure, stating that it protects the rights of both parties and relieves the courts of multiple suits.[65] In Louisiana, a recent decision required that, because an earlier state court decision precludes insureds from obtaining their own counsel at the insurer's expense, the insurer must obtain separate counsel for the insured.[66]

A third line of cases allows the insurer to specify in the insurance contract that the insurer has the right to assist in the choice of counsel.

60. Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 289 (Alaska 1980); McGee v. Superior Court, 176 Cal. App. 3d 221, 227, 221 Cal. Rptr. 421, 423 (1985).

61. 103 R.I. 623, 240 A.2d 397 (1968).

62. *Id.* at 635, 240 A.2d at 404.

63. Fireman's Fund Ins. Co. v. Waste Management of Wis., Inc., 777 F.2d 366, 370 (7th Cir. 1985). "There can be no more fair, sensible, and reasonable way for both parties to terminate this collateral dispute and to get on with the trial . . ." of the primary suit. *Id.*

64. Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co., 832 F.2d 1037, 1039 (7th Cir. 1987). *See also* Berch, M. and Berch, R., *Will the Real Counsel for the Insured Please Rise?*, 19 ARIZ. ST. L.J. 27, 43 (1987); Comment, *Reservation of Rights Notices and Nonwaiver Agreements*, 12 PAC. L.J. 763, 779 (1981).

65. Patrons Mut. Ins. Ass'n. v. Harmon, 240 Kan. 707, 712, 732 P.2d 741, 745 (1987) (citing Bell v. Tilton, 234 Kan. 461, 674 P.2d 468 (1983)).

66. Dugas Pest Control of Baton Rouge, Inc. v. Mutual Fire, Marine & Inland Ins. Co., 504 So. 2d 1051, 1054 (La. Ct. App. 1987) (citing Clemmons v. Zurich Gen. Accident & Liab. Ins. Co., 230 So. 2d 887, 895 (La. Ct. App. 1969)).

In *New York State Urban Development Corp. v. VSL Corp.*,[67] the insurance contract replaced the standard "duty-to-defend" clause with a clause providing that the insurer would pay the fees of any attorney appointed by the insurer or any attorney chosen by the insured with the insurer's approval.[68] Although it noted that New York law allows insureds the right to choose their own counsel, the court found that an insurance policy requiring the insurer's participation in the choice of independent counsel was "not inherently objectionable," provided that the insurer acted in good faith and the chosen counsel was truly independent and otherwise capable of defending the insured.[69] Similarly, the United States District Court for the Eastern District of New York relied upon *VSL* in upholding a local ordinance providing that county employees must choose their defense counsel from one of three attorneys designated by the county.[70]

VI. THE OKLAHOMA PERSPECTIVE

Oklahoma courts have had few opportunities to consider the problem of conflicting interests between an insurer and its insured. However, courts within the Tenth Circuit which have interpreted Oklahoma law have not embraced the independent counsel trend.

In *Traders & General Insurance Co. v. Rudco Oil & Gas Co.*,[71] the Tenth Circuit Court of Appeals held that the insurer violated the standard of "good faith and fair dealing" and thus could not avoid indemnification of its insured on grounds that the insured settled without the insurer's consent.[72] Despite this holding, the court's opinion supported the insurance industry practice of tendering defense under reservation of rights and seeking declaratory judgment to determine the duty to defend.[73] Although the tone of the opinion favored insurers, the court did reluctantly recognize that an insurer might use declaratory judgment to

67. 738 F.2d 61 (2d Cir. 1984).

68. *Id.* at 65.

69. *Id.*.

70. Suffolk County Patrolmen's Benevolent Ass'n. v. County of Suffolk, 595 F. Supp. 1471, 1482 (E.D.N.Y. 1984), *aff'd*, 751 F.2d 550 (2d Cir. 1985).

71. 129 F.2d 621 (10th Cir. 1942).

72. *Id.* at 628. The trial court found that the insurer's actions of refusing to recognize its insured's "patent liability," refusing to cooperate with the settlement process, filing a declaratory judgment action after agreeing to defend under reservation of rights, and then refusing to delay that action until after litigation of the primary tort suit against the insured, all "evidenced that its [the insurer's] primary and paramount interest was to establish its non-liability under the policy and not the defense of the claims and suits against its assured." *Id.* at 624-25.

73. *Id.* at 628. It should be noted that since this 1942 opinion, the Oklahoma Legislature has forbidden the use of declaratory judgments "concerning obligations alleged to arise under policies of

gain an "unfair advantage" over an insured[74] and further stated that any conflict of interest between the insurer and its insured subjects the insurer's conduct to closer scrutiny by the courts.[75]

Nearly forty years later, however, a federal district court opinion avoided any discussion of conflict of interest and refused the insured's demand for payment of independent counsel fees incurred when the insurer disclaimed coverage.[76] In *Gay & Taylor, Inc. v. St. Paul Fire & Marine Insurance Co.*,[77] the plaintiff, a casualty adjustment firm, faced actual and punitive damages in a suit alleging fraud and bad faith by the firm's agent.[78] When the insurance company refused responsibility for any punitive damages, Gay & Taylor obtained independent counsel to cover that aspect of its defense.[79] Two days before trial, the insurer denied coverage for the actual claims as well. The court found that this action prejudiced the insured's defense and thus estopped the insurer from denying indemnity for part of the subsequent settlement.[80]

Despite this obvious conflict between the interests of the insurer and the insured, the court rejected the insured's claim that the insurer, St. Paul Fire & Marine Insurance Co., should pay the independent attorney's fees.[81] The court stated that because the insurer's attorney remained willing to defend, the efforts of the insured's independent attorney were duplicative and were thus performed at the insured's expense.[82] Therefore, although the court previously stated that the insurer's conduct in disclaiming coverage within two days of trial did prejudice the insured, the court ignored the existence of this prejudice in its discussion of fees for the insured's independent counsel.

The Oklahoma Supreme Court has apparently not yet considered a case involving a conflict of interest between the insurer and the insured. However, the Oklahoma Court of Appeals stated in *Davis v. National*

insurance covering liability or indemnity against liability for such injuries." OKLA. STAT. tit. 12, § 1651 (1981).

74. *Traders & General*, 129 F.2d at 628.

75. *Id.* at 627.

76. Gay & Taylor, Inc. v. St. Paul Fire & Marine Ins. Co., 550 F. Supp. 710 (W.D. Okla. 1981).

77. *Id.*

78. *Id.* at 713.

79. *Id.*

80. *Id.* at 715. According to the court, "[p]rejudice to an insured is conclusively presumed where an insurer assumes the defense of an action and denies liability on the eve of trial." *Id.* at 718.

81. *Id* at 718. The plaintiff also claimed attorney fees on grounds that the insurer acted in bad faith. However, the court found that the plaintiff failed to prove the "requisite bad faith . . . . Defendant's conduct may be subject to criticism but it falls far short of amounting to bad faith." *Id.*

82. *Id.*

Pioneer Insurance Co.[83] that costs of attorney fees incurred in an action for bad faith against the insurer were not recoverable, even where the jury had found that the insurer acted unreasonably and in bad faith.[84] The court stated that Oklahoma law does not allow awards of attorney fees unless the parties have so contracted or the statutes provide otherwise.[85]

Although attorney fees in *Davis* were not incurred within a conflict of interest scenario but rather through a separate bad faith action against the insurer, this case illustrates the difficulty of obtaining attorney fees in Oklahoma absent specific statutory authority. An examination of the *Davis* case and the federal court decisions discussed above indicates that should a case having a palpable conflict of interest arise in the near future, courts in this jurisdiction may be resistant to arguments that the insured should be allowed independent counsel at the insurer's expense.

VII. Pros and Cons of the Independent Counsel Trend

Requiring insurance companies to provide independent counsel for insureds fulfills an insured's expectations that the insurer will pay the costs of defense counsel who will protect the insured's best interests. Requiring independent counsel also prevents any possibility of unethical conduct by any of the parties. Moreover, the increased costs involved would motivate insurers to curtail indiscriminate decisions to contest coverage.[86] However, the independent counsel trend has been criticized on several points.

Not surprisingly, supporters of the insurance defense bar protest that court decisions requiring use of independent counsel impugn the integrity of insurance defense attorneys. They further maintain that requiring independent counsel is generally unnecessary.[87] Such supporters

83. 515 P.2d 580 (Okla. Ct. App. 1973).

84. *Id.* at 583.

85. *Id.* at 584 (citing Okla. Stat. tit. 12, § 936 (1971)). Although § 936 does not expressly authorize attorney fees for an action based on an insurance contract, attorney fees are awarded to the prevailing party for a host of other actions, including "any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services. . . ." Okla. Stat. tit. 12, § 936 (1981).

86. Saxon, *Conflicts of Interest: Insurers' Expanding Duty to Defend and the Impact of "Cumis" Counsel,* 23 Idaho L. Rev. 351, 360 (1986). The decision to refrain from reserving the right to later contest coverage may also benefit third-party plaintiffs by removing "pressure . . . to settle their claims at reduced amounts." *Id.*

87. Wick, *A Commentary on Cumis,* For the Def., Nov. 1985, at 2 (This commentator characterized the conflict of interest discussion in San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984) as "an affront to insurance defense

argue that insurers prefer to engage defense counsel who will fulfill their professional responsibility obligations, both for purely ethical reasons and because any violations would expose the insurer to expensive retribution.[88]

Insurance defense counsel do not lack guidance on appropriate conduct in conflict of interest situations. The insurance defense bar provides ethical direction on conflicts of interest through "Guiding Principles" adopted by the National Conference of Lawyers and Liability Insurers and approved by major liability insurers.[89] Moreover, the Model Code of Professional Responsibility and the Model Rules of Professional Conduct also address the problem of conflicts of interest. Both the Code and the Rules mandate that the insurer's attorney obtain the consent of both parties to dual representation after a full disclosure regarding the risk of future conflicts of interests.[90] However, professional responsibility guidelines address only part of the problem when the interests of the insurer

---

counsel and to the insurance industry alike.") *See also* Hickman, *Royal Globe, Cumis Doctrines Rejected*, FOR THE DEF., Sept. 1986, at 7-8 (In discussing a recent Washington Supreme Court decision, Tank v. State Farm Fire & Casualty Co., 105 Wash. 2d 381, 715 P.2d 1133 (1986), the author states that "[u]nlike California, where the court impugned the integrity and professionalism of all defense counsel, the Washington court reminded counsel of their professional ethical obligations.").

88. Bianchesi, *Coverage Disputes With the Insured; The Insurer's Perspective*, 48 INS. COUNS. J. 153, 153 (1981); Wick, *supra* note 87, at 2.

89. Weithers, *The Coverage Role of Defense Counsel*, 48 INS. COUNS. J. 156, 158. Section IV of the Guiding Principles provides as follows:

> In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of facts or information which indicate to him a question of coverage in the matter being defended or any other conflict of interest between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the nature and extent of the conflicting interest. In any such suit, the company or its attorney should invite the insured to retain his own counsel at his own expense to represent his separate interest.

Id. at 158. Although the Guiding Principles were adopted by the American Bar Association in 1972, they were rescinded in 1980. Moore, *Insurer's Preservation of Rights*, FOR THE DEF., July 1984, at 26 n.18.

90. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1982); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

DR 5-105(a) of the MODEL CODE provides: "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests. . . ."

However, DR 5-105(c) provides: "[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105 (1982).

Rule 1.7 of the MODEL RULES provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

and the insured conflict. Neither the Code of Professional Responsibility nor the Rules of Professional Conduct answer the crucial question of who must pay for the independent counsel should the insured not consent to defense by the insurer's attorney. An individual insured may be unable to pay for an independent attorney and thus feel compelled to risk defense by the insurer. The independent counsel trend prevents such decisions by requiring that insurers cover the costs of independent counsel.

In addition to the argument that procuring independent counsel at the insurer's expense is largely unnecessary, the trend has been criticized on several other points. One major point of contention is the problem of increased costs to the insurer.[91] Insurers will often need to pay for two attorneys, one of which may not bill at the lower rate commonly charged by insurance defense firms.[92] Critics contend that the prospects of such additional expense may coerce the insurer into extending coverage to the insured even when unwarranted in order to remove any conflict.[93]

A second common criticism concerns the qualifications of the independent counsel chosen by the insured. Defense attorneys who are frequently retained by the insurer may have far greater experience than the insured's counsel.[94] Such inexperience may require the attorney to expend more effort and time than would an experienced defense attorney. This translates into greater expense, in addition to the increase borne by the insurer accustomed to paying discounted rates.[95] Further, the choice of an inexperienced defense attorney may be detrimental to the interests

---

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

91. Berg, *Losing Control of the Defense - the Insured's Right to Select His Own Counsel*, FOR THE DEF., July 1984, at 20; Comment, *Reservation of Rights Notices and Nonwaiver Agreements*, 12 PAC. L.J. 763, 778 (1981).

92. Comment, *Reexamining Conflicts of Interest: When Is Private Counsel Necessary?*, 17 PAC. L.J. 1421, 1431 (1986).

93. Berg, *supra* note 91, at 20. "Too often the insurer insists on taking a coverage position which, although theoretically sound, will cost more than it is worth . . . . It may simply be more cost-effective to voluntarily extend coverage." Berg, *supra* note 91, at 20.

94. Berg, *supra* note 91, at 20; Comment, *supra* note 91, at 779.

95. Comment, *supra* note 92, at 1431-32. "Private rates may be higher in comparison since standard defense counsel are accustomed to handling insurance defense cases and can therefore charge lower fees. Further, the amount of business generated by the insurer for standard counsel allows the demand of lower rates." Comment, *supra* note 92, at 1431-32 (citing Berg, *After Cumis: Regaining Control of the Defense*, FOR THE DEF., Aug. 1985, at 13-14.).

of the insured in avoiding liability, as well as the interests of the insurer in avoiding payment of a judgment.[96]

In addition, independent counsel requirements may make settlement decisions more difficult.[97] An insurer with access to all the facts concerning the occurrence at issue may enter settlement discussions more confident of its negotiating position. Where the insured's counsel attempts to protect its client by withholding information vital to the insurer's decision-making process, opportunities for settlement may go unrecognized to the detriment of both the insurer and the insured.[98]

In an attempt to correct some of the above disadvantages, California enacted legislation in 1987 regulating the choice of independent counsel.[99] The new law provides that a conflict of interest may arise "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim . . . ."[100] Punitive damages and claims above policy limits no longer create such a conflict.[101] The law allows the insurer to require that independent counsel meet certain qualifications, such as possessing at least five years' tort litigation experience, and limits fees to the rates the insurer generally pays other insurance defense attorneys.[102] Rather than leaving the choice entirely to the insured, the law also allows insurers to specify within the insurance policy a method of selecting independent counsel.[103] This legislation should return some

96. Comment, *supra* note 92, at 1432.

97. *Id.* at 1433.

98. *Id.*, citing Berg, *After Cumis: Regaining Control of the Defense,* FOR THE DEF., Aug. 1985, at 14-15. *But see* Saxon, *supra* note 86, at 360 for a different interpretation. ("Cumis also has had the effect of bringing about quicker settlements as insurers have a greater incentive to close files on which they are paying two sets of attorneys.").

99. CAL. CIVIL CODE § 2860(a) (West 1987 Supp.) As discussed earlier, California courts have firmly established an insurer's right to independent counsel where the insurer's reservation of rights creates a conflict of interest. *See, e.g.*, San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984).

100. CAL. CIVIL CODE § 2860(b) (West 1987 Supp.).

101. *Id.*

102. *Id.* at § 2860(c), which provides in part:

> (c) When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of tort litigation practice which includes substantial defense experience in the subject at issue in the litigation, and (2) errors and omissions coverage. The insurer's obligation to pay . . . is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended . . . .

Id.

103. *Id.* at 2860(a).

measure of control to the insurer and prevent spiraling litigation costs within California.

VIII. SUGGESTIONS FOR OKLAHOMA

Given time, Oklahoma courts will surely encounter cases involving serious conflicts between the best interests of the insured and the insurer. In order to avoid penalizing the insured who is threatened by the insurer's adverse interests, the insurer should pay the costs of independent counsel to defend the insured. However, it is not necessary to sacrifice all the benefits afforded by the traditional insurer-retained defense attorney system.

California statutory law and court opinions from several jurisdictions provide guidance on how to best preserve the legitimate interests of both parties.[104] The insured should be allowed to choose an independent attorney from a list of competent defense attorneys having no connection or relationship with the insurer. In the alternative, the insurer should have the opportunity to approve the insured's choice of counsel. Regardless of the method used, the insurer should only be obligated to pay reasonable costs, as measured by fees paid by the insurer to its regular counsel. With these guidelines, both the insurer and the insured may be assured of receiving the benefits for which they contracted in the insurance agreement.

IX. CONCLUSION

The majority of liability lawsuits do not involve conflicts between the interests of the defendant-insured and the insurer, but should a conflict arise, the insured's best interests may be compromised. In an attempt to prevent injury to insureds involved in such a situation, a number of jurisdictions have expanded the insurer's contractual duty to defend to include a duty to provide independent defense counsel. Yet critics charge that this solution imposes too harsh a burden on the insurer in the form of increased defense costs, and may be detrimental to insurer and insured alike should the chosen counsel be less capable than the insurer's attorney.

104. Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co., 832 F.2d 1037 (7th Cir. 1987); Fireman's Fund Ins. Co. v. Waste Management of Wis., Inc., 777 F.2d 366 (7th Cir. 1985); New York State Urban Dev. Corp. v. VSL Corp., 738 F.2d 61 (2d Cir. 1984); Patrons Mut. Ins. Ass'n. v. Harmon, 240 Kan. 707, 732 P.2d 741 (1987); Dugas Pest Control v. Mutual Fire, Marine & Inland Ins. Co., 504 So. 2d 1051 (La. Ct. App. 1987); Employers' Fire Ins. Co. v. Beals, 103 R.I. 623, 240 A.2d 397 (1968).

A few jurisdictions have chosen a moderate approach which protects the insured's interests while allowing the insurer to control costs and assure the selection of competent counsel. Although the conflict of interest problem between insurer and insured has yet to receive judicial attention in Oklahoma, such conflicts will eventually be litigated. Both the judiciary and the Oklahoma legislature should act to preserve the interests and expectations of the insurer and the insured.

Michelle Kissell Price